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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
Docket Section
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Joint Application of

UNITED AIR LINES, INC.

and

DEUTSCHE LUFTHANSA, A.G.
(LUFTHANSA GERMAN AIRLINES)

under 49 U.S.C. 41308 and 41309 for
approval of and antitrust immunity for
an expanded alliance agreement

Docket OST 96-1116 -17

CONTINGENT MOTION FOR LEAVE TO FILE AND
REPLY OF JOINT APPLICANTS TO RESPONSE OF AMERICAN AIRLINES

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Contingent Motion for Leave to File

American has failed to show any "good cause," as required by Section 302.5(f) of the Department's regulations, for accepting its additional pleading and, patently, none exists. Notwithstanding American's vague contention that accepting the pleading would be "in the interest of a complete and accurate record," its Response does nothing to advance the record's completeness or accuracy: it advances no new evidence and no new arguments. Accepting such a superfluous pleading would undermine

the credibility of the Department's procedural rules and deadlines.

If the Department nonetheless decides to grant American's motion, however, the Joint Applicants request leave to file the instant Reply responding again to the erroneous contentions in American's filings. Pursuant to the Department's policy of affording applicants an opportunity to reply to responses, if American's Response is accepted, the Joint Applicants clearly deserve an opportunity to reply.

Reply of Joint Applicants

American's Response simply restates two contentions made previously in its Answer: (1) the Department should not act on the United/Lufthansa Joint Application while earlier filed applications for antitrust immunity are still pending; and (2) antitrust immunity should be withheld until Lufthansa has ceased engaging in "anticompetitive CRS behavior" in Germany. As previously demonstrated by the Joint Applicants, both objections are fallacious and furnish no basis for denying or delaying approval of the Joint Application.

- 1. The Department need not and should not wait until the other applications have been resolved to act on the Joint Application.**

American again advances no valid reason why the Department should delay action on the Joint Application now that the record in this proceeding is complete. As the Joint

Applicants explained in their Joint Reply, governing law clearly does not require the Department to rule first on comparable prior filed applications, absent some federal statutory or due process requirement that it do so. Joint Reply at 3-4. American does not challenge this statement of law. Yet it cites no legal basis for delaying Departmental action and, notwithstanding vague invocations of "orderly administrative procedures" and "basic principles of fairness," does not contend that acting on the United/Lufthansa Joint Application prior to American's application would violate American's due process rights.

In the absence of any statutory or constitutional reason to act upon the three pending antitrust immunity applications in a prescribed sequence, "**orderly** administrative procedures" in fact require that the Department act upon each application as soon as it is ripe for decision. The Joint Application clearly is ripe and the Department would well serve the public interest by acting upon it promptly. Any delay would unnecessarily deny the public the valuable benefits detailed in the Joint Application and Joint Reply.

2. **There is no evidence of anticompetitive CRS behavior by Lufthansa in Germany and, in any event, this proceeding is not the forum in which this issue should be addressed.**

American reiterates that it is dissatisfied with **SABRE's** performance in Germany and concludes that the only possible explanation for this performance must be anticompetitive

behavior by Lufthansa. As in its Answer, American theorizes that Lufthansa's anticompetitive behavior against SABRE comes in two forms: (i) Lufthansa is forcing German travel suppliers not to utilize SABRE; and (ii) Lufthansa is discriminating against SABRE in Germany by denying it **"very important functionalities"** connected to Lufthansa's own services. While American develops these speculations at some length, it offers absolutely no credible evidence to support either one.

A. German travel suppliers. Although American's Response broadly alleges that Lufthansa has influenced "German travel suppliers" in general not to participate in SABRE, it in fact names only one such entity as currently not participating: the **TUI** tour company.^{1/} As a preliminary matter, American fails to explain how the CRS choices of this single tour company have resulted in the entire German travel industry shying away from SABRE. But even assuming arsuendo that such causality could be established, there is no probative evidence that Lufthansa controls the CRS decisions of TUI or any other German travel supplier for that matter.

American offers in support of its conspiracy theory a newspaper article reporting **SABRE's** plans to raise with German antitrust authorities **TUI's** decision not to participate in SABRE.

^{1/} In its Answer, American also alleged that Lufthansa was controlling the CRS decisions of LTU, DER Tours, Ameropa and Eurowings, although it provided no evidence to support this allegation. It makes no further mention of these entities in its Response.

At one point the article speculates that "it could have been that the SABRE options had exercised certain pressure on Lufthansa to agree to their concessions." However, the article subsequently offers no evidence that Lufthansa exerted any influence over **TUI's** decision, notes that TUI (far from acting like a controlled entity) forced Lufthansa to undergo "tough rounds of discussions," and reports that TUI itself has emphasized that its decision not to participate in SABRE was undertaken for reasons consistent with its own ownership interest in START. American Answer, Attachment 3.

Beyond this, American can proffer nothing more than a laundry list of "cross-ownership stakes" among German companies in the transportation sector, and an extended quotation from a four-year-old report on the European tour operator industry generally noting that such cross-ownership relationships exist. Neither constitutes evidence that Lufthansa controls the CRS decisions of TUI. Indeed, the only facts even remotely relevant to the relationship between Lufthansa and TUI are American's allegations that Lufthansa owns 10% of Hapag-Lloyd and that Hapag-Lloyd owns 30% of TUI -- together suggesting that Lufthansa has indirectly a 3% interest in TUI. Clearly such a minor indirect stakeholding furnishes no basis to argue that Lufthansa controls **TUI's** CRS decisions. In fact, Lufthansa's minority shareholding vests it with no control over Hapag-Lloyd, which independently votes its shareholding of TUI.

Finally, having failed to adduce even circumstantial evidence that Lufthansa controls TUI and needing evidence that Lufthansa has at some time influenced the CRS decision of some German travel-related company, American cites a two-year-old letter from Deutsche Bahn ("DB"), the German national railroad, in which DB explains the "negative decision of the use of the Start board in SABRE PCs."^{2/} American's suggestion that Lufthansa is somehow responsible for this decision is completely unfounded.

As the letter explains up front, in portions not quoted by American, at the time in question, the ability to distribute DB's services sought by SABRE could have been made available only by handing over all of Start's technology and functionality -- "in simple words: SABRE would install Start Terminals with the SABRE logo in front." American Response, Attachment 3 at 1. In effect, by placing SABRE logos on Start terminals, SABRE sought the right to market Start's technology. The wholesale release to SABRE of such technology, at least without sufficient compensation, was apparently unacceptable to Start and to DB, as one of Start's owners. The two-year-old DB letter American is relying upon offers no support whatsoever for the proposition that if a solution short of a complete surrender of Start's technology had been available, DB would still have been unwilling to allow SABRE to distribute DB's services. Indeed, DB's letter

^{2/} Clearly, American cannot urge that granting Lufthansa and United antitrust immunity be made contingent on DB's participation in SABRE, as DB has apparently recently agreed to do so.

states: "DB has sought and still tries to seek moderately priced alternatives to the distribution via **Start.**" Id. at 2. In any event, DB, like TUI, is not owned or controlled by Lufthansa, and its CRS decisions are entirely independent of Lufthansa.

B. Lufthansa's functionality in SABRE. In its Response, American now concedes -- as the Joint Applicants argued in their Joint Reply -- that Lufthansa "has a high level of connectivity with **SABRE.**" American Response at 11. Nevertheless, American continues to allege that Lufthansa denies SABRE two "important subscriber **functionalities**" -- tickets on departure ("**TODs**") in Germany and HON numbers.

As a preliminary matter, American fails to demonstrate how the absence of these two functionalities -- among the many that Lufthansa does offer with SABRE -- could possibly be part of a Lufthansa-orchestrated anticompetitive conspiracy against SABRE or how it relates to **SABRE's** relative performance in Germany. In any event, American's allegations are misleading.

- While it is true that Lufthansa passengers cannot obtain **TODs** in Germany through SABRE, it is because SABRE does not offer TOD products in Germany or, at the moment, anywhere else in Europe. Lufthansa understands that SABRE intends to launch its first European TOD product in the U.K. on May 13, 1996. Although its U.K. **TODs** will be initially limited to British Midland,

SABRE has stated that it plans subsequently to make the product available in the U.K. to other carriers and has asked Lufthansa to participate. As American acknowledges in its Response, Lufthansa has agreed to do so. Moreover, Lufthansa hopes some day to be able to utilize a comparable SABRE TOD product in Germany and elsewhere, if and when it is actually made available by SABRE.

Lufthansa does not refuse **SABRE** access to the "HON numbers" given to certain priority passengers and agents utilizing SABRE are freely able to input HON numbers with passenger bookings. SABRE does not possess the capability to validate HON numbers or to convert these numbers into **waitlist** priorities. To ensure that HON members are uniformly given priority, Lufthansa, independently and at its own cost, last year developed the capability to recognize and validate the priority status of its HON members and to automatically accord the HON member **waitlist** priority regardless of which CRS the passenger books through.

Clearly there is no basis for American's suggestion that Lufthansa is discriminating against SABRE by virtue of **TOD's** in Germany or HON number functionality. In fact, Lufthansa, seeking

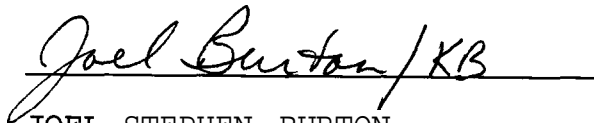
to sell its services through as many channels as possible, has no reason to discriminate against SABRE or any other CRS.

C. This is not the **appropriate** forum for these **complaints**. It is clear that American's CRS complaints are unsubstantiated. But even assuming that these complaints raised issues requiring further consideration, American has available to it forums far better suited to consider such allegations than the instant proceeding. With respect to American's two remaining concerns about Lufthansa's SABRE functionality, the parties should be able to obtain a satisfactory resolution through commercial negotiation and cooperation. While the parties cannot purport to speak for TUI, a similar approach might be successful in securing its participation in SABRE. To the extent that irreconcilable differences remain, and American believes that it has legally cognizable claims against those who are not adequately availing themselves of **SABRE's** services, SABRE has available numerous administrative and judicial mechanisms -- including complaints to the German antitrust authorities -- far better suited than the instant, unrelated proceeding to conduct the requisite fact-finding, obtain the participation of all relevant parties, and secure the resolution of differences.

Conclusion

The self-evident thinness of American's allegations betrays American's real objective: holding up approval of the

United/Lufthansa Alliance Expansion Agreement until after its own antitrust immunity application is acted upon. This objective should not be condoned. The Joint Applicants urge the Department promptly to approve the Alliance Expansion Agreement under 49 U.S.C. 41309 and exempt United and Lufthansa and their respective affiliates from the antitrust laws pursuant to 49 U.S.C. 41308, for a period not less than five years in duration, to allow the Joint Applicants to proceed with the Alliance Expansion Agreement.

Handwritten signature of Joel Stephen Burton in cursive, followed by a horizontal line.

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DATED: April 30, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Contingent Motion for Leave to File And Reply of Joint Applicants to Response of American Airlines on all persons listed on the service list below by causing a copy to be sent via first class mail, unless otherwise indicated.


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